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IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court U.S.
FILED
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No. 05-184

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR SUPPLEMENTAL BRIEFING

On January 12, 2006, pursuant to this Court's Rule 21, respondents filed a motion to dismiss this case for lack of jurisdiction in light of the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A., Tit. X, 119 Stat. 2739. That motion will provide this Court with the additional briefing requested by petitioner and will permit the Court to address the threshold jurisdictional defect created by the DTA as soon as practicable. Petitioner has agreed to file his response to respondents' motion to dismiss on or by January 31, 2006, and the Court has informed the parties that the motion to dismiss will be listed for the February 17, 2006 conference. The briefing on the motion obviates the need for the supplemental briefing proposed by petitioner.

This Court permits the filing of motions to dismiss to address jurisdictional or other fundamental defects that arise following

the grant of certiorari. See Resp. Mot. To Dismiss for Lack of Jurisdiction 2 n.1. As explained in respondents' motion to dismiss, the DTA in plain terms removes jurisdiction over this action, but, at a bare minimum, it creates grave doubts about the Court's jurisdiction. The Court should therefore address its jurisdiction to hear this action as soon as practicable through respondents' motion to dismiss, rather than addressing that threshold issue together with the merits of the case in the ordinary course, as petitioner has proposed. Respondents' motion to dismiss not only will permit the Court to receive briefing on the jurisdictional issue that equals or exceeds the scope of supplemental briefing proposed by petitioner, but also will permit the Court to address the jurisdictional issue at an earlier date. Even if the Court defers ruling on respondents' motion, the briefing on the motion to dismiss will be available to the Court at argument. In addition, if the Court grants the motion, the Court may dispose of this case before oral argument on the merits.

Petitioner will not be prejudiced by this common-sense approach. First, he may file an opposition to the motion up to 30 pages in length under the Court's rules. In his motion for supplemental briefing, petitioner suggested that the parties be permitted to file principal briefs up to 25 pages in length. Second, four amicus briefs have already been filed in support of petitioner addressing the impact of the DTA on this case. See Br.

for Amici Curiae Norman Dorsen, et al. in Support of Petitioner; Br. for Amici Curiae Center for National Security Studies and the Constitutional Project Supporting Petitioner on the Effect of the Detainee Treatment Act of 2005; Br. for Amicus Curiae Arthur Miller in Support of Petitioner; Br. for Amici Curiae of More Than 300 Detainees Incarcerated at Naval Station, Guantanamo Bay, Cuba, and Their Family Members in Support of Petitioner and in Support of Jurisdiction. This Court will accordingly have no shortage of material and argument in opposition to the motion.*

The supplemental briefing requested by petitioner is therefore unnecessary and would needlessly prolong resolution of a threshold question going to the power of the Court to consider this action that ought to be decided as promptly as possible.

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* Even though the DTA was enacted on December 30, 2005 -- a week before petitioner's merits brief was due -- and even though petitioner filed a petition for an original writ of habeas corpus in this Court on December 19, 2005, addressing the anticipated enactment of the DTA and its jurisdiction-removing language, petitioner (unlike his amici) chose not to address the impact of the DTA in his merits brief. Indeed, other than referring (Br. 1) obscurely to the DTA as the "Department of Defense Appropriations Act" in his jurisdictional statement with no mention of the Act's jurisdiction-removing provision, petitioner elected to ignore the DTA. There is no rule that permits a party to forgo briefing on a matter that could be addressed in its principal merits brief and instead simply pursue supplemental briefing to address the matter after filing its merits brief, and the Court should not encourage that practice. If anything, that is particularly true with respect to jurisdictional issues that go to the power of the courts to hear a case.

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For the foregoing reasons, petitioner's motion for supplemental briefing should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2006